Supreme Court, U.S.
FILED
AUG 3 - 2000
OFFICE OF THE CLERK

No. 00 182

IN THE
SUPREME COURT OF THE UNITED STATES

GERALD E. TAYLOR and
BETTY A. TAYLOR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Through the Office of the United States Trustee,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in this no-asset Chapter 7 bankruptcy case, payments from the Petitioners' ERISA-Qualified Pension Plan constitute "disposable income" distributable to creditors under a "hypothetical Chapter 13 plan" analysis conducted pursuant to 11 U.S.C. § 707(b).

PARTIES TO THE PROCEEDING

Petitioners

Gerald E. Taylor and Betty A. Taylor are Debtors in a Chapter 7 bankruptcy matter. They are individuals who have no parent companies or non-wholly owned subsidiaries.

Respondent

The Respondent is the United States of America through the Office of the United States Trustee.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 212 F.3d 395 (8th Cir. 2000). A copy of the Opinion is included in the Appendix as Appendix A at 1a-5a. The Opinion of the United States District Court for the Southern District of Iowa is not published, but is included as Appendix B at 6a-12a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion on May 5, 2000. This Petition for Writ of Certiorari is filed within 90 days of the issuance of the Eighth Circuit Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL REVIEW AND STATUTORY PROVISIONS INVOLVED

Employee Retirement Security Act of 1974[1]
29 U.S.C. § 1056(d)(1)

(d) Assignment or alienation of plan benefits.

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

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[1] The Employee Retirement Income Security Act of 1974 is referred to throughout this Petition as "ERISA."

United States Bankruptcy Code
11 U.S.C. § 707(b)

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

STATEMENT OF THE CASE

On February 18, 1998, Petitioners filed their petition for bankruptcy relief pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Iowa (the "Bankruptcy Court"). The Bankruptcy Court had jurisdiction over Petitioners' bankruptcy case pursuant to 28 U.S.C. §§ 157(a) and (b), and 1334(a). Venue was proper in the Southern District of Iowa pursuant to 28 U.S.C. § 1408.

Following a May 5, 1999 hearing, on May 7, 1998, a final Order dismissing Petitioners' Chapter 7 bankruptcy case pursuant to 11 U.S.C. § 707(b) was entered by the

Bankruptcy Court.[2] On May 15, 1998, Petitioners filed their Notice of Appeal with the Bankruptcy Court. The United States District Court for the Southern District of Iowa (the "District Court") had jurisdiction over Petitioners' appeal pursuant to 28 U.S.C. § 158(a)(1).[3] On September 10, 1999, the District Court entered its final Order on Appeal from United States Bankruptcy Court, affirming the Bankruptcy Court's dismissal of Petitioners' no-asset Chapter 7 bankruptcy case. App. B at 12a.

On October 12, 1999, Petitioners filed their Notice of Appeal to the Eighth Circuit Court of Appeals from the District Court's Order. The Eighth Circuit had jurisdiction over Petitioners' appeal pursuant to 28 U.S.C. § 158(d). On May 5, 2000, the Court of Appeals affirmed the District Court's Order dismissing Petitioners' no-asset Chapter 7 bankruptcy case.

Courts in the Eighth Circuit conduct a "hypothetical Chapter 13 case" analysis in determining whether a voluntary Chapter 7 bankruptcy case constitutes a "substantial abuse" of the provisions of the Bankruptcy Code[4], such that dismissal is warranted under 11 U.S.C. § 707(b). In this case, the Court is asked to decide whether it is proper to classify ERISA-

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[2] The Honorable Lee M. Jackwig presiding.

[3] Generally, the appeal would have proceeded to the United States Bankruptcy Appellate Panel for the Eighth Circuit created pursuant to 28 U.S.C. 158(b). Respondent instead elected to have the appeal heard by the United States District Court for the Southern District of Iowa, as provided by 8th Cir. B.A.P. Local Rule 8001A(a) and (b).

[4] 11 U.S.C. § 101, *et seq.*

qualified pension benefits as "disposable income" under such an analysis. Petitioners contend that such a classification is improper as a matter of law.

Petitioners' ERISA-qualified benefits cannot be alienated for the benefit of creditors. This is true regardless of their involvement in a bankruptcy case. *Patterson v. Shumate,* 504 U.S. 753, 764 (1992), *citing Butner v. United States,* 440 U.S. 48, 55 (1979); *Lewis v. Manufacturers Nat'l* Bank, 364 U.S. 603, 609 (1961); *and Guidry v. Sheet Metal Workers Pension Fund,* 493 U.S. 365 (1990)*; see generally* 29 U.S.C. § 1056(d)(1) . Petitioners' ERISA-qualified plan benefits cannot be alienated for the benefit of creditors through the bankruptcy process, whether they filed a Chapter 7 case (which they did) or a Chapter 13 case (which they did not). The "hypothetical" Chapter 13 analysis conducted by the courts below, which classified Petitioners' ERISA-qualified benefits as "disposable income" subject to distribution to satisfy the claims of creditors (and all Chapter 13 plan payments are, even in a hypothetical world, remitted to creditors), is very real, very reversible, error.

ARGUMENT FOR GRANTING WRIT

The issues here arise from the interaction of two significant federal statutes: The Bankruptcy Code (specifically 11 U.S.C. § 707(b)) and ERISA (specifically, 29 U.S.C. § 1056(d)). As recently as 1992, this Court addressed the interplay between the Bankruptcy Code and ERISA's anti-alienation provisions in a written opinion. *See, e.g., Patterson*. The narrow issue of whether ERISA-Qualified Pension Plan benefits constitute "disposable income" distributable to creditors under a "hypothetical Chapter 13 plan" analysis conducted pursuant to 11 U.S.C. § 707(b) is an

important question of federal law that has not yet been settled by this Court.

The published decision of the Eighth Circuit Court of Appeals[5] conflicts in principle with, and undermines the precedential value of, the Supreme Court opinions issued in *Guidry* and *Patterson*. The resolution of the issues presented here will have a direct impact on the rights and financial affairs of individuals across the country who receive ERISA-qualified benefits, but are experiencing financial difficulties at a level sufficient to cause them to contemplate seeking bankruptcy relief. This Court should resolve the issue of first impression presented here. The need for clear judicial guidance from this Court is acute.

ARGUMENT 1

THE COURTS BELOW ERRED IN HOLDING THAT PAYMENTS FROM THE PETITIONERS' ERISA-QUALIFIED PENSION PLAN CONSTITUTE "DISPOSABLE INCOME" DISTRIBUTABLE TO CREDITORS WHEN CONDUCTING A "HYPOTHETICAL CHAPTER 13 PLAN" ANALYSIS PURSUANT TO 11 U.S.C. § 707(b).

A. ERISA Unequivocally Prohibits the Alienation of Petitioners' Pension Benefits for the Benefit of Creditors.

The pension benefits at issue here are paid to Petitioners from the ERISA-qualified Deere & Co. Pension

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[5] 212 F.3d 395; *see* App. A at 1a - 5a.

Plan.[6] ERISA contains an anti-alienation provision which, without exception, precludes creditors from gaining any access to benefits paid from qualified plans to plan participants. *See generally* 29 U.S.C. § 1056(d)(1); *Patterson,* 504 U.S. at 764, *citing Guidry*.

B. There is no Bankruptcy Exception to ERISA's Prohibition Against the Alienation of Benefits Paid to Plan Participants from ERISA-qualified Plans.

This Court has specifically refused to create a bankruptcy exception to ERISA's prohibition against the alienation of benefits paid to plan participants from ERISA-qualified plans. *See Patterson*, 504 U.S. at 764. Quoting the *Patterson* Court:

> First, our decision today ensures that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status. *See Butner v. United States*, 440 U.S. 48 (1978) (observing that "[u]niform treatment of property interests" prevents "a party from 'receiving a windfall merely by reason of the happenstance of bankruptcy,'" quoting *Lewis v. Manufacturers National Bank,* 364 U.S. 603, 609 (1961)). We previously have declined to recognize any exceptions to ERISA's anti-

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[6] The parties have stipulated that the pension benefits at issue here are paid to Petitioners from the Deere & Company pension plan, which is an ERISA-qualified plan. App. B at 7a - 8a.

> alienation provision *outside* the bankruptcy context. *See Guidry v. Sheet Metal Workers Nat. Pension Fund,* 493 U.S. 365 (1990) (labor union may not impose constructive trust on pension benefits of union official who breached fiduciary duties and embezzled funds). Declining to recognize any exceptions to that provision *within* the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds. (citation omitted).

Patterson at 764 (emphasis in original).

The language from this Court's *Patterson* decision could not be more clear. Benefits paid to plan participants from ERISA-qualified plans (including the plan payments received by the Petitioners) are not subject to alienation for the benefit of creditors in bankruptcy proceedings as a matter of law. *Id.* Under this Court's decision in *Patterson*, the Petitioners' Deere & Co. ERISA-qualified Pension Plan payments are not subject to distribution to creditors in this or any other bankruptcy case, as "disposable income" or otherwise, whether the bankruptcy case is real or "hypothetical." *Id.*

C. Since There is No Bankruptcy Exception to ERISA's Prohibition Against the Alienation of Benefits Paid to Plan Participants from ERISA-Qualified Plans, the Courts Below Erred in Classifying Petitioners' ERISA-Qualified Plan Payments as "Disposable Income" Subject to Distribution to Creditors in a " Hypothetical" Chapter 13 Bankruptcy Case.

Petitioners qualify as Chapter 7 debtors, and filed their voluntary bankruptcy petition pursuant to Chapter 7 (***not Chapter 13***) of the Bankruptcy Code. *See generally* 11 U.S.C. §§ 109 and 701, *et seq*. The administration of the Petitioners' no-asset bankruptcy estate is governed by the provisions of Chapter 7 (***not Chapter 13***) of the Bankruptcy Code. Petitioners' Deere & Co. Pension Plan payments are not subject to distribution to creditors in this no-asset Chapter 7 case as a matter of law. *See Patterson*, 504 U.S. at 764. The crux of the issue here is whether granting Petitioners a bankruptcy discharge (at age 60+) in their no-asset Chapter 7 bankruptcy case (in which neither creditors nor the panel trustee have objected to exemptions or discharge) is a "substantial abuse" of the Bankruptcy Code, warranting dismissal under 11 U.S.C. § 707(b). Dismissal was not, and is not, appropriate here.

The sole statutory premise of Respondent's Motion to Dismiss Petitioner's bankruptcy case, sustained by the courts below, is 11 U.S.C. §707(b). That section provides, in pertinent part:

§707. Dismissal.

. . .

(b) after notice and a hearing, the Court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual under this Chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this Chapter. There shall be a presumption in favor of granting the relief requested by the Debtor.

. . . .

The text of 11 U.S.C. § 707(b) ***does not*** define the term "substantial abuse", ***nor does it incorporate Bankruptcy Code provisions outside the scope of Chapter 7, either by reference or by implication. There is no language in the text of 11 U.S.C. § 707(b), or anywhere else in Chapter 7 of the Bankruptcy Code, which compels federal courts to engage in a "hypothetical Chapter 13 analysis" for purposes of determining whether a particular case constitutes a "substantial abuse."***

Faced with having to divine the meaning of the undefined term "substantial abuse" in the text of 11 U.S.C. § 707(b), the Eighth Circuit Court of Appeals adopted a "hypothetical Chapter 13 analysis" to determine whether a Chapter 7 case is subject to dismissal pursuant to that section. *See, e.g., In re Koch,* 109 F.3d 1285 (8th Cir. 1997); *Fonder v. United States,* 974 F.2d 996 (8th Cir. 1992); *United States Trustee v. Harris*, 960 F.2d 74 (8th Cir. 1992); *In re Walton,* 866 F.2d 981 (8th Cir. 1989). The Eighth Circuit has, in that context, "held that a Chapter 7 debtor's ability to fund a

Chapter 13 plan 'is the primary factor to be considered in determining whether granting relief would be a substantial abuse.'" *Koch,* at 1286, *citing Walton* at 984-85.

In their analysis under 11 U.S.C. § 707(b), the Courts below held that the Petitioners' ERISA-qualified pension income was "disposable income" distributable to creditors in a "hypothetical Chapter 13 plan," effectively ignoring ERISA's prohibition against the alienation of benefits paid to participants from ERISA-qualified plans. *See* App. A, pp. 4a-5a; App. B, pp. 9a-12a. The District Court mischaracterized the Petitioners' position as being premised upon the ***exempt status*** of their ERISA-qualified pension benefits (i.e., as opposed to being protected from alienation under *Patterson* and ERISA's anti-alienation provision at 29 U.S.C. § 1056(d)(1)). App. B at 10a-11a. The courts below also advanced "bankruptcy policy" grounds in support of dismissal. App. B at p. 9a; App. A at pp. 4a-5a. The legal analysis evident from the lower courts' written decisions, and also their reliance on "bankruptcy policy" as grounds for dismissal of the Petitioners' case pursuant to 11 U.S.C. § 707(b), constitutes reversible error.

1. In Conducting Their "Hypothetical Chapter 13 Analysis," the Courts Below Erroneously Assumed That All Income Received by a Chapter 7 Debtor, Without Exception, is Subject to Distribution to Creditors in a Chapter 13 case.

The lower courts held that ***all income received by a debtor, without exception***, must be considered disposable income distributable to creditors in a "hypothetical Chapter 13

analysis" under 11 U.S.C. § 707(b).[7] *See* App. B at 9a-12a; App A at 3a-5a.

The District Court failed to directly address the Petitioners' position with respect to their ERISA-qualified plan benefits (i.e., that the plan benefits are not subject to

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[7] Assuming without in any manner conceding that the provisions of Chapter 13 of the Bankruptcy Code have some relevance to the administration of this ***no-asset Chapter 7 case***, it is significant that a "disposable income test" ***is NOT*** essential to the confirmation of every Chapter 13 plan.

Under the plain language of 11 U.S.C. § 1325, in the absence of an objection by the trustee or the holder of an allowed unsecured claim, a bankruptcy court "shall confirm a Chapter 13 Plan" if the proposed plan meets the requirements of 11 U.S.C. § 1325(a), without reference to disposable income test of 11 U.S.C. § 1325(b)(1)(B). *See generally,* 11 U.S.C. § 1325(a) *and* (b)(1)(b). The disposable income test of 11 U.S.C. § 1325(b)(1)(B) becomes relevant only if a Chapter 13 trustee or holder of an allowed unsecured claim objects to confirmation of the proposed Chapter 13 plan. *See generally,* 11 U.S.C. §§ 1325(a) *and* (b)(1)(b).

Here, no creditors appeared in the Petitioners' no-asset case, and the trustee filed a no-asset case report, not an objection to any plan (as no plan is required in a Chapter 7 case). There is no basis in the record to suggest that the facts which are conditions precedent to a "disposable income" analysis under 11 U.S.C. § 1325(a) and (b) are present. Nor is there any statutory authority requiring resort to the provisions of Chapter 13 in the administration of the Petitioners' Chapter 7 bankruptcy case. The same concerns expressed by Justice Scalia in his concurring opinion in *Patterson* are present here. *Patterson*, 504 U.S. at 766-67 (Scalia, J., concurring).

alienation under *Patterson* and its interpretation of 29 U.S.C. § 1056(d)(1)). The District Court's legal analysis was instead comprised of analogies to cases where various non-ERISA benefits, exempt from creditor claims ***under state and federal law other than ERISA***, were held to be includable as "disposable income" under a "hypothetical Chapter 13 analysis":

> The Taylors argue that the anti-alienation provision contained in ERISA § 206(d)(1) prevents any income from the plan from being considered when determining disposable income. . . . The Taylors rely heavily on the Supreme Court's interpretation of the ERISA anti-alienation clause in *Patterson v. Shumate*, 504 U.S. 753 (1992). The *Patterson* Court found that the anti-alienation provision of § 206(d)(1) constituted a restriction on transfer enforceable under "applicable nonbankruptcy law" as provided in 11 U.S.C. § 541(c)(2) of the Bankruptcy Code, and accordingly, a debtor could exclude his interest in such a plan from property of the bankruptcy estate. *See Patterson*, 504 U.S. at 755. However, this Court does not find *Patterson* dispositive of the instant case. ***Although pension benefits may be exempt property, a debtor's ability to claim an exemption is an independent issue from whether the debtor has the ability to repay his or her debts.*** (Citations omitted).

App. B at 10a (emphasis added). Petitioners do not base their position upon state or federal exemption statutes. Petitioners base their position upon the anti-alienation provisions of ERISA, and specifically 29 U.S.C. § 1056(d)(1).

The Court of Appeals likewise mischaracterized Petitioners' arguments as a claim that the ERISA-qualified benefits at issue were "exempt from creditors." App. A, p. 4a. The Court of Appeals also plainly ignored the anti-alienation provisions of ERISA, and relied exclusively upon the provisions of ***Chapter 13*** of the Bankruptcy Code in upholding the dismissal of Petitioners' no-asset ***Chapter 7*** bankruptcy case:

> The fact that a pension is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the pension plan is also disposable income for purposes of Chapter 13. The question of whether income from a pension is exempt from creditors is a wholly independent inquiry from the question of whether the pension income is reasonably necessary to support the debtor. *See In re Morse,* 164 B.R. 651, 656 (Bankr. E.D. Wash 1994). The latter question is the pertinent inquiry for purposes of Chapter 13. *See Koch,* 109 F.3d at 1289. In regard to the former question, we note that ***nothing in the language of Chapter 13 prevents the funding of a Chapter 13 plan with exempt income.***[8] *See id.; In re Hagel,* 184 B.R. 793, 798 (B.A.P.

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[8] While that may be true with respect to the provisions of Chapter 13 of the Bankruptcy Code, *Patterson* and *Guidry* clearly establish that ***ERISA*** prohibits the alienation of qualified plan payments for the benefit of creditors. 29 U.S.C. § 1056(d)(1). Without question, creditors receive Chapter 13 plan payments. Moreover, there is no statutory basis for the Court of Appeals' reference to Chapter 13 bankruptcy principles in connection with the administration of the Petitioners' Chapter 7 bankruptcy case.

> 9th Cir. 1995). ***Hence the question of whether a pension plan is exempt or otherwise restricted by a federal anti-alienation provision is irrelevant in a Chapter 13 context.***

App. A at 4a-5a (emphasis added).

Petitioners recognize that the Court of Appeals has held that certain payments *which are exempt from creditor claims under state or non-ERISA federal law,* such as tax refunds, social security benefits, workers compensation benefits, personal injury recoveries, and unemployment benefits are includable as "disposable income" distributable to creditors in the "hypothetical Chapter 13 analysis" under 11 U.S.C. § 707(b). *See, e.g., Koch* (citing cases). It is equally true, however, that those cases do not address, and the Supreme Court ***has not*** squarely addressed, the very narrow issue presented on the specific, stipulated facts of this case: Whether ERISA's anti-alienation provisions operate to exclude pension payments received by participants in ERISA-qualified plans from "disposable income" payable to creditors under a "hypothetical Chapter 13 plan analysis" pursuant to 11 U.S.C. § 707(b).

This Court ***has***, however, held that ***there is no bankruptcy exception*** to ERISA's prohibition against the alienation of benefits paid to plan participants from ERISA-qualified plans. *See Patterson,* 504 U.S. at 764. By failing to properly recognize and apply ERISA's anti-alienation provisions in its "hypothetical Chapter 13" analysis, and reaching the related legal conclusion that the Petitioners' ERISA-qualified pension benefits would be "disposable income" distributable to creditors in a "hypothetical Chapter 13" case, ***the courts below effectively created a***

"hypothetical Chapter 13 analysis exception" to ERISA's anti-alienation provision! In doing so, the lower courts acted in a manner wholly inconsistent with the Supreme Court's mandate in *Patterson* that no exceptions to the anti-alienation provisions of ERISA exist, inside or outside of bankruptcy. *See Patterson*, 504 U.S. at 764.

Inclusion of Petitioners' ERISA-qualified pension benefits as "disposable income" distributable to creditors in a "hypothetical Chapter 13 plan" analysis under 11 U.S.C. § 707(b) is the analytical equivalent of the "strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible [ERISA-qualified] funds" prohibited by the *Patterson* decision. *Id.* Under the particular facts of this case, the decisions of the courts below constitute reversible error.

2. The Courts Below Also Committed Reversible Error in Relying Upon "Bankruptcy Policy" in Sustaining the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b).

The District Court made passing reference to policy considerations in its affirmance of the Bankruptcy Court:

> The Eighth Circuit has commented "[w]ith the enactment of [11 U.S.C. § 707(b)], debtors no longer have unfettered access to voluntary Chapter 7 relief." *In re Walton*, 866 F.2d 981, 982 (8th Cir. 1989). Section 707(b) is "aimed primarily at stemming the use of Chapter 7 relief by unneedy debtors." *Id.* at

> 983 (citing S. Rep. No. 65, 98th Cong., 1st Sess. 3 (1983)).

App. B at 9a.

Like the legal analysis employed by the courts below, such "bankruptcy policy" concerns are inconsistent with the Supreme Court's holding in *Patterson*. In rejecting "bankruptcy policy" arguments like those advanced by the District Court here, the *Patterson* Court stated:

> Section 206(d) [29 U.S.C. § 1056(d)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are blameless), ***even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.***

Patterson, 504 U.S. at 765, *quoting Guidry* (emphasis added). The analysis found in the *Patterson* case set forth above applies with equal, if not greater, force in the present context. In *Patterson*, this Court found that the policies underlying ERISA's anti-alienation provisions were paramount to "the Bankruptcy Code's policy of ensuring a broad inclusion of assets in the bankruptcy estate." *See Patterson*. The Eighth Circuit Court of Appeals has, in other cases, also acknowledged that the policy of protecting ERISA-qualified pension benefits is paramount to "bankruptcy policy" arguments like those relied upon by the lower courts here. *See Whetzal v. Anderson*, 32 F.3d 1302, 1304 (8th Cir. 1994) (in *Shumate*, "the Court emphasized its view that the more important policy is protecting pension benefits.").

The courts below erroneously employed a policy analysis deeming the bankruptcy policies underpinning 11 U.S.C. § 707(b) to be paramount to the policies advanced by ERISA's anti-alienation provision: protection of pension benefits. This policy conclusion is wholly inconsistent with the policy analysis set forth by both the United States Supreme Court in *Patterson,* and even the Court of Appeals in its own opinion in *Whetzal*. The lower courts' "policy" analysis is reversible error.

ARGUMENT 2

THE COURTS BELOW ERRED IN HOLDING THAT PETITIONERS HAD SUFFICIENT DISPOSABLE INCOME TO REPAY A SUBSTANTIAL PORTION OF THEIR UNSECURED CONSUMER DEBT.

Having reached an erroneous legal conclusion (that Petitioners' ERISA-qualified pension payments constituted "disposable income" distributable to creditors in the context of a "hypothetical Chapter 13 analysis"), the courts below looked to the parties' stipulation, and concluded that Petitioners had sufficient disposable income to repay a substantial portion of their unsecured debt. *See,* App. B at 11a-12a; App. A pp. 4a-5a.

Had the courts below reached ***the correct*** legal conclusion (i.e., that the Petitioners' ERISA-qualified pension payments ***do not*** constitute "disposable income" distributable to creditors in the context of a "hypothetical Chapter 13 analysis"), they would have been compelled by the parties' stipulation to find that the Petitioners lacked the ability to repay a substantial portion of their unsecured debt. App. B at 7a - 8a. The lower courts' failure to hold that the Petitioners

lacked the ability to repay a substantial portion of their unsecured debt is reversible error, directly attributable to their erroneous legal and policy analysis as set forth above.

ARGUMENT 3

THE COURTS BELOW ERRED IN SUSTAINING THE UNITED STATES TRUSTEE'S MOTION TO DISMISS THIS NO-ASSET CHAPTER 7 CASE PURSUANT TO 11 U.S.C. § 707 (b) AS A "SUBSTANTIAL ABUSE" OF THE BANKRUPTCY CODE.

Erroneous legal analysis and "policy" considerations led the lower courts to the incorrect conclusion that ERISA-qualified benefits are "disposable income" in a "hypothetical Chapter 13" case, and ultimately to the incorrect conclusion that the Petitioners had the ability to repay a substantial portion of their unsecured debt through a "hypothetical Chapter 13 plan." App. B, pp. 11a-12a; App. A pp. 4a-5a. The erroneous analysis employed by the courts below culminated in an erroneous holding, affirmed by the Eighth Circuit Court of Appeals, that the Petitioners' ability to repay a substantial portion of their unsecured debt warranted dismissal of Petitioners' no-asset Chapter 7 bankruptcy case pursuant to 11 U.S.C. § 707(b). App. B pp. 11a-12a; App. A pp. 4a-51. In short: The dismissal of Petitioners' no-asset Chapter 7 case as a "substantial abuse" of the Bankruptcy Code constitutes reversible error, which must be corrected. This Court must therefore issue the Writ of Certiorari requested by the Petitioners.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Otherwise, this Court will suffer (a) the constructive reversal of *Patterson* and *Guidry* by inferior federal courts, and (b) continued confusion among the federal courts as to the proper treatment of ERISA-qualified plan benefits in resolving motions to dismiss pensioners' Chapter 7 bankruptcy cases under 11 U.S.C. § 707(b).

The Court of Appeals' decision in this case is wholly inconsistent with this Court's holdings in *Guidry* and *Patterson* as to the scope of the anti-alienation provisions contained in all ERISA-qualified plans. The "hypothetical Chapter 13 plan" analysis employed by the courts below in sustaining the dismissal of the Petitioners' no-asset Chapter 7 bankruptcy case effectively, and erroneously, created a "hypothetical Chapter 13 analysis exception" to ERISA's anti-alienation provision. This Court has clearly rejected any such exception to ERISA's anti-alienation provisions, and has long sought to ensure "that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status." *Patterson*, 504 U.S. at 764.

The use of "hypothetical" facts and "hypothetical" Chapter 13 proceedings to defeat the Petitioners' real world request for relief under Chapter 7 of the Bankruptcy Code is a seriously flawed analytical process, with immediate and adverse impact upon the goal of ERISA long recognized by this Court: Ensuring that "if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." *Patterson*, at 764-65, *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). Supreme Court guidance on the

narrow issue presented here is critical and essential to that goal. This Court should seize the opportunity to provide all federal courts faced with the questioned presented here "a neutral and rational interpretive methodology . . . so that the symbol of our profession may remain the scales, not the seesaw." *Patterson,* at 766-67 (Scalia, J., concurring).

Respectfully submitted,

WHITFIELD & EDDY, P.L.C.

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed May 5, 2000]

No. 99-3831

In re: Gerald E. Taylor; Betty Taylor, *Debtors.*	)
Gerald E. Taylor; Betty A. Taylor, *Appellants,*	)
v.	)
United States of America, *Appellee.*	)

Appeal from the United States District Court for the Southern District of Iowa.

OPINION

Before BOWMAN and HANSEN, Circuit Judges, and CARMAN,[1] Judge.

HANSEN, Circuit Judge.

Gerald E. Taylor and Betty A. Taylor appeal the district court's[2] decision affirming the bankruptcy court's[3] dismissal of their bankruptcy petition. The bankruptcy court determined that the Taylors' petition constitutes a substantial abuse of the bankruptcy system because the Taylors are able to pay their creditors. See 11 U.S.C. § 707(b) (authorizing dismissal upon a finding of substantial abuse of the bankruptcy system); In re Walton, 866 F.2d 981,982 (8th Cir. 1989) (holding that dismissal of a bankruptcy petition pursuant to § 707(b) is appropriate when a reviewing court finds that debtors possess the ability to pay their creditors). In reaching its conclusion regarding the Taylors' ability to pay their creditors, the bankruptcy court included income from Gerald Taylor's ERISA[4]-qualified pension in its calculation of

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[1] The Honorable Gregory W. Carman, Chief Judge, United States Court of International Trade, sitting by designation.

[2] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

[3] The Honorable Lee M. Jackwig, United States Bankruptcy Judge for the Southern District of Iowa.

[4] The Employee Retirement Income Security Act of 1974 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994 & Supp. III

the Taylors' disposable income. Acting as an appellate court, the district court reviewed the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See In re Fairfield Pagosa, Inc., 97 F.3d 247, 252 (8th Cir. 1996) (citations omitted). After conducting its review, the district court upheld the bankruptcy court's findings and conclusions. (See Dist. Ct. Ord. at 5.) We conduct a second, independent review of the bankruptcy court's decision applying the same standards as the district court. See Fairfield Pagosa, 97 F.3d at 252.

The question of whether a bankruptcy court may include an ERISA-qualified pension in its calculation of a petitioner's disposable income is an issue of first impression in this circuit. In In re Koch, 109 F.3d 1285, 1287-90 (8th Cir. 1997), we held that a debtor's disability payments could be considered in the disposable income calculus even though the payments were classified as exempt from creditors under South Dakota state law and, therefore, exempt from creditors under Chapter 7 of the United States Bankruptcy Code. We concluded that the relevant inquiry is not whether the payments are exempt from creditors in a Chapter 7 proceeding but whether the challenged payments would constitute income in a hypothetical proceeding under Chapter 13 of the United States Bankruptcy Code. See id. at 1288-89.

Chapter 13 affords "an individual with regular income" the option of preserving their "pre-petition assets through a three- to five-year plan funded primarily" with that

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1997) and in scattered sections of Title 26 U.S.C.).

individual's regular income. Id. at 1288 (citing 11 U.S.C. § 109(e)). If, however, an unsecured creditor or trustee objects to the confirmation of the Chapter 13 plan, the debtor can obtain Chapter 13 relief only if the plan "provides that all of the debtor's projected disposable income to be received [during the three-year plan] will be applied to make payments under the plan." Id. at 1289 (quoting 11 U.S.C. § 1325(b)(1)(B)). Disposable income is income received by the debtor that is not reasonably necessary for support of the debtor, the debtor's dependants, or the debtor's business. Id.; 11 U.S.C. § 1325(b)(2)(A) and (B). As the bankruptcy court determined, Gerald Taylor's ERISA-qualified pension is not reasonably necessary to support the Taylors. Hence, it is disposable income as defined in § 1325(b)(2)(A) and (B).

The Taylors argue that ERISA's anti-alienation provisions, see 29 U.S.C. § 1056(d)(1), exempts the pension plan from the disposable income calculation. The Taylors base their argument on Patterson v. Shumate, 504 U.S. 753 (1992). In Patterson, the Supreme Court held that ERISA's anti-alienation provision constituted an enforceable transfer restriction in a proceeding instituted under 11 U.S.C. § 541 (c)(2). See 504 U.S. at 760. The Taylors contend that pursuant to the Patterson Court's interpretation of ERISA's anti-alienation provision, a bankruptcy court may not include an ERISA-qualified pension in its calculation of disposable income. The Taylors' reliance on Patterson is misplaced.

The fact that a pension is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the pension is also disposable income for purposes of Chapter 13. The question of whether income from a pension is exempt from creditors is a wholly independent inquiry from

the question of whether the pension income is reasonably necessary to support the debtor. See In re Morse, 164 B.R. 651, 656 (Bankr. E. D. Wash. 1994). The latter question is the pertinent inquiry for purposes of Chapter 13. See Koch, 109 F.3d at 1289. In regard to the former question, we note that nothing in the language of Chapter 13 prevents the funding of a Chapter 13 plan with exempt income. See id.; In re Hagel, 184 B.R. 793,798 (B.A.P. 9th Cir. 1995). Hence, the question of whether a pension plan is exempt or otherwise restricted by a federal anti-alienation provision is irrelevant in a Chapter 13 context. Accordingly, the bankruptcy court committed no error when it included Gerald Taylor's ERISA-qualified pension in its calculation of the Taylors' disposable income and dismissed the Taylors' bankruptcy petition pursuant to § 707(b). We, therefore, affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

[Filed September 15, 1999]

No. 98-00612-CJ
4-98-CV-90353

In re:	)	
	)	
GERALD E. TAYLOR and	)	Chapter 7
BETTY A. TAYLOR,	)	98-00612-CJ
Debtors.	)	
	)	
GERALD E. TAYLOR and	)	
BETTY A. TAYLOR,	)	4-98-CV-90353
Appellants,	)	
	)	
v.	)	
	)	
UNITED STATES TRUSTEE,	)	
Appellee.	)	
	)	

ORDER ON APPEAL FROM UNITED STATES BANKRUPTCY COURT

Gerald E. Taylor and Betty A. Taylor ("Mr. Taylor" and "Mrs. Taylor," respectively, "the Taylors," collectively) appeal from Chief Bankruptcy Judge Lee M. Jackwig's May

7, 1998 final Order granting the United States Trustee's Motion to Dismiss the Taylors' Chapter 7 bankruptcy case as a "substantial abuse" of the Bankruptcy Code pursuant to 11 U.S.C. § 707(b). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1).

I. Legal Standard

When a bankruptcy court judgment is appealed to a district court, the district court acts as an appellate court and reviews the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. *See In re Fairfield Pagosa, Inc.*, 97 F.3d 247, 252 (8th Cir. 1996) (citing *Wegner v. Grunewaldt*, 821 F.2d 1317, 1320 (8th Cir. 1987)). In this case the parties stipulated to the facts presented to the bankruptcy court. Therefore, the only issue before this Court is the single legal issue that was before Judge Jackwig: whether payments from Mr. Taylor's pension plan should be included as "disposable income" pursuant to an analysis under 11 U.S.C. § 707(b).

II. Facts

The Taylors filed their voluntary Chapter 7 Petition on February 18, 1998. Their amended Schedule J indicates reasonable monthly expenditures of $2,799.64, exclusive of credit card payments. Their amended Schedule I indicates net monthly income of $4,603.48, consisting of income from employment and pension plans. Specifically at issue is the income from Mr. Taylor's Deere & Company pension, a qualified plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). Per the parties' stipulation, if the $1,770 per month received from the plan were included

as disposable income distributable to creditors under the "hypothetical Chapter 13 plan analysis pursuant to 11 U.S.C. § 707(b), then: (1) the Taylors' monthly income would exceed their reasonable monthly expenses by $1,803.84 per month; (2) the $1,803.84 monthly surplus would generate a 36-month dividend to unsecured creditors of $64,938.24, and a 60-month dividend of $108,230.40, a 59.91% and 99.84% payout respectively based on the Taylors' $108,400 total unsecured debt; and (3) the Taylors would have the ability to repay a substantial portion of their unsecured consumer debt.

Conversely, the parties stipulated that if the $1,770 per month received from Mr. Taylors' pension plan were not included as disposable income: (1) the Taylors' monthly income would exceed their reasonable monthly expenses by $33.84 per month; (2) the $33.84 monthly surplus would generate a 36-month dividend to unsecured creditors of $1,218.24, and a 60-month dividend of $2,030.40, a 1.12% and 1.87% payout respectively; and (3) the Taylors would not have the ability to repay a substantial portion of their unsecured consumer debt. Judge Jackwig found that the income from the ERISA-qualified pension plan was includable as disposable income, and dismissed the Taylors' case. This Court reviews the conclusion of the bankruptcy court *de novo*.

III. Analysis

Pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 353, ("the Act"), Congress added subsection b to section 707 of the Bankruptcy Code which provides:

> (b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b). The Eighth Circuit has commented, "[w]ith the enactment of [the Act], debtors no longer have unfettered access to voluntary Chapter 7 relief." *In re Walton,* 866 F.2d 981,982 (8th Cir. 1989). Section 707(b) is "aimed primarily at stemming the use of Chapter 7 relief by unneedy debtors." *Id.* at 983 (citing S. Rep. No. 65, 98th Cong., 1st Sess. 3 (1983)). While the term "substantial abuse" is not defined within the section or elsewhere in the Bankruptcy Code, the focus of this flexible standard is the debtor's ability to pay debts owed creditors out of future income. *See id; In re Koch,* 109 F.3d 1285, 1288 (8th Cir. 1997) (holding that substantial ability to pay creditors by itself warrants dismissal for substantial abuse).

The debtor's ability to repay creditors for § 707(b) purposes is measured by evaluating the debtors' financial condition under a hypothetical Chapter 13 proceeding. *See Koch,* 109 F.3d at 1288; *Walton,* 866 F.2d at 984-85. In funding a plan under Chapter 13, courts are guided by § 1325(b): "all of the debtor's projected disposable income to be received [during the duration of the plan] will be applied to make payments under the plan." *Koch,* 109 F.3d at 1289 (quoting 11 U.S.C. § 1325(b)(1)(B)). "Disposable income"

is defined as income not necessary to support a debtor, a debtor's dependents, or a debtor's business. *See* 11 U.S.C. § 1325(b)(2). The question is whether Mr. Taylor's pension income can be considered when determining the amount of disposable income in a hypothetical Chapter 13 analysis, and thus as part of the Taylors' ability to pay under Chapter 7.

The Taylors argue that the anti-alienation provision contained in ERISA § 206(d)(1) prevents any income from the plan from being considered when determining disposable income. The provision reads "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The Taylors rely heavily on the Supreme Court's interpretation of the ERISA anti-alienation clause in *Patterson v. Shumate,* 504 U.S. 753 (1992). The *Patterson* Court found that the anti-alienation provision of § 206(d)(1) constituted a restriction on transfer enforceable under "applicable nonbankruptcy law" as provided in 11 U.S.C. § 541(c)(2) of the Bankruptcy Code, and accordingly, a debtor could exclude his interest in such a plan from the property of the bankruptcy estate. *See Patterson,* 504 U.S. at 755. However, this Court does not find *Patterson* dispositive of the instant case. Although pension benefits may be exempt property, a debtor's ability to claim an exemption is an independent issue from whether the debtor has the ability to repay his or her debts. *See Koch,* 109 F.3d at 1289 (holding that exempt income should be included in hypothetical Chapter 13 disposable income calculation under Chapter 7 substantial abuse analysis); *In re Hegel,* 184 B.R. 793,796 (B.A.P. 9th Cir. 1995) (citing *In re Hegel,* 171 B.R. 686, 689 (Bankr. D. Mont. 1994)).

The Hegel court addressed whether social security payments, also subject to an anti-alienation clause[1], could be considered in calculating a debtor's disposable income under Chapter 13. The court noted that because section § 1325(b) does not qualify income by reference to its exempt status, income from exempt property should be included in the disposable income calculation. *See Hagel,* 184 B.R. at 796 (citing *In re Morse,* 164 B.R. 651, 655 (Bankr. E. Wash. 1994); *In re Schnabel*, 153 B.R. 809, 815 (Bankr. N.D. Ill, 1993)); *accord Koch,* 109 F.3d at 1289 (cases cited therein). The *Hagel* court noted that 11 U.S.C. § 1322(b) specifically allows a debtor to make payments from exempt property, and notes that the inclusion of payments from exempt property for the purpose of calculating ability to pay is different from the inclusion of exempt property in assets to be administered by the trustee[2]. *See Hagel,* 184 B.R. at 798.

The *Koch* and *Hagel* cases are determinative of the outcome of this case. The Court, therefore, finds that the income from Mr. Taylor's pension was properly included in the disposable income calculation, leaving the Taylors with

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[1] That anti-alienation provision reads: "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a).

[2] The inclusion of income from excluded property in the disposable income calculation does not conflict with the policy objectives of the anti-alienation provision. *See In re Hagel,* 184 B.R. at 797 (social security).

substantial ability to pay their creditors, which warrants a dismissal of their Chapter 7 petition for substantial abuse. The Bankruptcy Court's decision is AFFIRMED.

IT IS SO ORDERED.

Dated this 10th day of September, 1999.

/s/_____
ROBERT W. PRATT
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 19 2000
CLERK

(2)

No. 00-182

In the Supreme Court of the United States

GERALD E. TAYLOR AND BETTY A. TAYLOR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether a bankruptcy court may take a debtor's income from a pension plan into account for purposes of determining whether he has sufficient disposable income to repay his debts and thus whether discharging those debts would constitute a "substantial abuse" of Chapter 7 of the Bankruptcy Code.

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In the Supreme Court of the United States

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GERALD E. TAYLOR AND BETTY A. TAYLOR,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 212 F.3d 395. The opinion of the district court (Pet. App. 6a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2000. The petition for a writ of certiorari was filed on August 3, 2000, and entered on the Court's docket on August 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, a married couple, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy

Code (11 U.S.C. 701 *et seq.*). They represented that they had reasonable monthly expenses of $2799.64 and net monthly income of $4603.48, including $2665.48 from current employment and $1770 from petitioner Gerald Taylor's pension from Deere & Co. The Deere & Co. pension plan is a qualified plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 2a, 7a; C.A. App. 62-63.

The United States Trustee moved to dismiss petitioners' Chapter 7 petition for "substantial abuse" pursuant to 11 U.S.C. 707(b) (1994 & Supp. IV 1998).[1] Under circuit precedent, in evaluating a claim of "substantial abuse," a bankruptcy court focuses on whether the debtor has the ability to repay a substantial portion of his unsecured consumer debt, which the court measures by evaluating what the debtor's financial condition would be in a "hypothetical chapter 13 proceeding." *In re Koch*, 109 F.3d 1285, 1288 (8th Cir. 1997).[2]

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[1] Section 707(b) states, in relevant part:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

[2] Under Chapter 13 (11 U.S.C. 1301 *et seq.*), "an individual with regular income" has the option of preserving his assets through a plan funded primarily with that income. 11 U.S.C. 109(e). If an unsecured creditor or trustee objects to the confirmation of the Chapter 13 plan, the debtor still may obtain relief under Chapter 13 if the plan "provides that all of the debtor's projected disposable income * * * will be applied to make payments under the plan." 11 U.S.C. 1325(b)(1)(B). The statute defines "disposable income" as income received by the debtor that is not reasonably necessary

The parties stipulated that, if the payments that petitioners received from the Deere & Co. pension plan were included in their "disposable income" for purposes of such an analysis, see 11 U.S.C. 1325(b) (1994 & Supp. IV 1998), petitioners' income would exceed their reasonable expenses by $1803.84 a month. That would generate a dividend to unsecured creditors of $64,938.24 over 36 months and $108,230.40 over 60 months—a 59.91% payout and a 99.84% payout, respectively, based on petitioners' $108,400 in total unsecured debt. The parties stipulated that petitioners' income otherwise would exceed their reasonable expenses by only $33.84 a month, generating a dividend to unsecured creditors of $1218.24 over 36 months and $2030.40 over 60 months. Accordingly, the parties agreed that whether petitioners had the ability to repay a substantial portion of their unsecured consumer debt turned on whether the payments that they received under the pension plan could be included in their "disposable income." Pet. App. 8a; C.A. App. 64-65.

2. The bankruptcy court granted the United States Trustee's motion to dismiss petitioners' Chapter 7 petition on grounds of substantial abuse. The court rejected petitioners' contention that ERISA's anti-alienation provision—which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated," 29 U.S.C. 1056(d)(1)—prevented the payments made to petitioners under the Deere & Co. pension plan from being included in their disposable income. C.A. App. 88-92. The court then held that petitioners had sufficient disposable income "to pay a significant portion of their

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to support the debtor, his dependents, or his business. 11 U.S.C. 1325(b)(2) (1994 & Supp. IV 1998).

debt" once the payments under the pension plan were included. *Id.* at 97.[3]

3. The district court affirmed. Pet. App. 6a-12a. The court concluded that ERISA's anti-alienation provision did not require the bankruptcy court to ignore the pension income in calculating petitioners' total disposable income. The court reasoned that, while "pension benefits may be exempt property, a debtor's ability to claim an exemption is an independent issue from whether the debtor has the ability to repay his or her debts." *Id.* at 10a. The court noted that Social Security benefits, which are also subject to an anti-alienation provision, may be considered in assessing a debtor's disposable income under Chapter 13. *Id.* at 11a.

4. The court of appeals, in turn, affirmed. Pet. App. 1a-5a. The court agreed that a bankruptcy court may take a debtor's income from an ERISA pension plan into account in determining whether the debtor has sufficient disposable income to repay his debts and thus to preclude resort to Chapter 7. *Id.* at 4a-5a. The court explained that the application of ERISA's anti-alienation provision to the present case was not controlled by *Patterson* v. *Shumate*, 504 U.S. 753 (1992), which held that an individual's interest in an ERISA pension plan is exempt from the reach of creditors. The court explained that "the relevant inquiry is not whether the payments are exempt from creditors in a Chapter 7 proceeding but whether the challenged payments

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[3] The transcript of the argument on the motion in bankruptcy court, including the court's oral ruling, was not included in the appendix to the petition for a writ of certiorari. It may be found in the appendix in the court of appeals at pages 80-99.

would constitute income in a hypothetical proceeding under Chapter 13." Pet. App. 3a.

ARGUMENT

The only issue raised by the petition is whether ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1), prevents a bankruptcy court from considering a debtor's income from a pension plan in determining whether he has sufficient disposable income to repay most or all of his unsecured consumer debt, such that discharging him from that debt would constitute "a substantial abuse" of Chapter 7 of the Bankruptcy Code. See 11 U.S.C. 707(b) (1994 & Supp. IV 1998).[4] The Eighth Circuit's resolution of that issue is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. ERISA's anti-alienation provision states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). A regulation issued by the Department of the Treasury reiterates that prohibition,

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[4] While petitioners imply that the Eighth Circuit's case law holding that a court determines whether a Chapter 7 petition should be dismissed for substantial abuse by evaluating a "hypothetical" Chapter 13 petition is questionable (see Pet. 9 & 11 n.7), they do not challenge that case law for purposes of the petition. See Pet. 9-15 (complaining that court of appeals misapplied the test). Nor do they assert a circuit conflict based on the slightly varying standards applied by the circuits in assessing substantial abuse. Every circuit that has addressed the substantial abuse issue under 11 U.S.C. 707(b) (1994 & Supp. IV 1998) has agreed that a debtor's ability to repay his creditors is at least an important factor in whether to dismiss a Chapter 7 petition. See generally *In re Stewart*, 175 F.3d 796, 808-809 (10th Cir. 1999) (discussing cases in six other circuits).

26 C.F.R. 1.401(a)-13(b)(1), and defines the terms "assignment" and "alienation" as:

> [a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. 1.401(a)-13(c)(1)(ii).

This case does not involve *any* assignment or alienation whatsoever, much less the sort of assignment or alienation that ERISA prohibits. First, the bankruptcy court simply held that petitioners were not entitled to be discharged from their debts—*i.e.*, that granting them such relief would constitute "a substantial abuse" within the meaning of Section 707(b)—because they have sufficient disposable income, including their pension income, with which to repay those debts. The bankruptcy court, in accord with circuit precedent, reached that conclusion by considering whether petitioners could adequately fund a "hypothetical" Chapter 13 plan, *i.e.*, a plan under which a debtor may repay his creditors over a three-to five-year period out of his current income.[5] The bankruptcy court's ruling thus

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[5] The rationale behind that hypothetical determination is that, if a Chapter 7 debtor has regular disposable income sufficient to repay a substantial portion of his unsecured consumer debt, it would constitute a "substantial abuse" of Chapter 7 to discharge him from that debt. The bankruptcy court thus determines whether the debtor would have sufficient "disposable income," see 11 U.S.C. 1325(b) (1994 & Supp. IV 1998), to support a Chapter 13 plan to repay most of his debt over a three- to five-year period. If such a hypothetical Chapter 13 plan could be adequately funded, the Eighth Circuit deems it a substantial abuse to allow the debtor

did not cause any creditor to "acquire[]" from petitioners any "right or interest * * * in, or to, all or part of a plan benefit payment." 26 C.F.R. 1.401(a)-13(c)(1)(ii). It left petitioners' interest in their benefits under the Deere & Co. pension plan undisturbed.[6]

Second, Section 1056(d)(1) does not restrict a participant or beneficiary from alienating pension plan assets after those assets have been distributed to him. The participant or beneficiary may "alienate" or "assign" such assets to the same extent that he may alienate or assign his other assets, and a number of courts of appeals have held that creditors may reach such assets to the same extent that they may reach the participant's or beneficiary's other assets. See, *e.g.*, *Robbins* v. *DeBuono*, 218 F.3d 197, 203 (2d Cir. 2000) (holding that ERISA's anti-alienation provision "protects benefits only while they are held by the plan administrator and not after they reach the hands of the beneficiary"), petition for cert. pending (No. 00-489) (filed Sept. 28, 2000); accord *Wright* v. *Riveland*, 219 F.3d 905, 919-921 (9th Cir. 2000); *Trucking Employees of N. Jersey Welfare Fund, Inc.* v. *Colville*, 16 F.3d 52, 55 (3d Cir.

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to seek a discharge under Chapter 7. See *In re Koch*, 109 F.3d 1285, 1288 (1997).

[6] Indeed, petitioners' position would suggest, for example, that a lender, in determining whether an individual has sufficient income to qualify for a mortgage or other credit, could not take into account the individual's income from a pension. It would also suggest that a debtor cannot use his pension income to fund a Chapter 13 plan, under which a debtor may repay his creditors out of current income while preserving his home and other significant assets. Such rules would severely disadvantage those whose income comes primarily from pensions. There is no reason to suppose that ERISA's anti-alienation clause was intended to produce such results.

1994).[7] Here, in assessing whether petitioners would have sufficient disposable income over a three-to five-year period to repay a substantial portion of their debts, the bankruptcy court took into account the funds that would be distributed to petitioners over that period from the Deere & Co. pension plan, *i.e.*, the funds that petitioners themselves could freely alienate or assign without regard to Section 1056(d)(1). The bankruptcy court did *not* include in its calculation any of the funds that would remain in the pension plan to provide for petitioners' future support.[8]

2. Contrary to petitioners' assertion (Pet. 5), the court of appeals' decision in this case does not "conflict[] in principle with" either *Patterson* v. *Shumate*, 504 U.S. 753 (1992), or *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). *Patterson* and

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[7] In *United States* v. *Smith*, 47 F.3d 681 (4th Cir. 1995), the court of appeals invalidated, as contrary to ERISA's anti-alienation provision, a district court's requirement that a defendant convicted of mail and wire fraud "turn over upon receipt each month the entire amount of his pension benefits payable under an ERISA plan" as restitution. *Id.* at 682. This would not be an appropriate case in which to resolve any tension between *Smith* and the cases cited in the text, because this case, unlike all of those cases, does not involve any alienation of benefits. The Fourth Circuit has not suggested that a bankruptcy court cannot, as in this case, take a debtor's pension income into account in assessing whether the debtor has sufficient disposable income to repay his creditors, and thus whether granting the debtor a discharge under Chapter 7 would constitute "substantial abuse" within the meaning of 11 U.S.C. 707(b) (1994 & Supp. IV 1998).

[8] A different question would be presented if a bankruptcy court included in the hypothetical Chapter 13 analysis pension funds not already being distributed to the debtor as income (*e.g.*, if the court considered funds that the debtor could receive only by obtaining a loan from the pension plan or by electing early retirement).

Guidry are unlike this case for both of the reasons discussed above. Those cases involved an actual (attempted) alienation of assets, not a mere calculation of an individual's disposable income; and those cases involved assets still in the pension plan, not assets that had already been distributed to a participant or beneficiary.

In *Patterson*, after an individual debtor had filed for bankruptcy protection under Chapter 7, the trustee sought to recover the debtor's interest in his pension plan for the benefit of the bankruptcy estate. This Court held that ERISA's anti-alienation provision, as a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law," 11 U.S.C. 541(c)(2), prevented the transfer of the debtor's interest in the pension plan to the estate. *Patterson*, 504 U.S. at 757-760. The Court was thus concerned only with pension benefits that had not been distributed to the debtor.

In *Guidry*, after a union officer had been found guilty of embezzling funds from the union, the district court imposed a constructive trust on any right that he might have to benefits under his union pension, "so that the benefits would be paid to the Union rather than to" the officer. 493 U.S. at 369. This Court held that the constructive trust violated Congress's choice, embodied in ERISA's anti-alienation provision, "to safeguard a stream of income for pensioners." *Id.* at 376. Again, the Court was concerned only with pension benefits that had not been distributed to the officer. The Court did not hold that the officer's pension income, once paid out to him by the pension plan, would be beyond the reach of the union or other creditors. Indeed, the Tenth Circuit, on remand, held that the anti-alienation provision did not bar the garnishment of the officer's bank

account into which his pension benefits were paid. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1082-1083 (1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

In sum, neither *Guidry* nor *Patterson* provides any support for petitioners' contention that ERISA's anti-alienation provision prevented the bankruptcy court from taking their pension income into account in assessing whether they had sufficient disposable income to repay their creditors.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2000

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[9] There is no reason for the Court to hold the petition in this case for disposition in light of *Egelhoff* v. *Egelhoff*, No. 99-1529, which presents the question whether ERISA preempts a state law that purports to revoke upon divorce a plan participant's designation of his spouse as beneficiary pursuant to the terms of an ERISA plan. In that case, the petitioner and the United States, as amicus curiae, have argued, among other things, that the state law, as applied to ERISA pension plans, conflicts with ERISA's anti-alienation provision. See Pet. Br. 36-41; U.S. Br. 24-25. This case is distinguishable from *Egelhoff*, which involves a statute that purports to effect an actual alienation of a beneficiary's interest in an ERISA pension plan.